

IDENTIFICATION AND DESCRIPTION OF
APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENTS
FOR FEASIBILITY STUDY ANALYSIS OF ALTERNATIVES

SILVER BOW CREEK/BUTTE AREA SUPERFUND SITE
BUTTE PRIORITY SOILS OPERABLE UNIT (OU 8)

September 2006

LIST OF ACRONYMS

ARAR	Applicable or Relevant and Appropriate Requirements
ATSDR	Agency of Toxic Substances and Disease Registry
BAT	Best Available Technology Economically Achievable
BCT	Best Conventional Pollutant Control Technology
BPCTCA	Best Practicable Control Technology Currently Available
BPJ	Best Professional Judgment
BPSOU	Butte Priority Soils Operable Unit
BTCA	Best Technology Currently Available
CCC	Criterion Continuous Concentration
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended
CMC	Criteria Maximum Concentration
DEQ	State of Montana Department of Environmental Quality
DEQ-7	Circular DEQ-7, Montana Numeric Water Quality Standards
EPA	U.S. Environmental Protection Agency
HWM	Hazardous Waste Management
MCL	Maximum Contaminant Level
MCLG	Maximum Contaminant Level Goal
MGWPCS	Montana Groundwater Pollution Control System
MPDES	Montana Pollutant Discharge Elimination System
NCP	National Contingency Plan, as amended
NESHAPS	National Emissions Standards for Hazardous Air Pollutants
NPL	National Priorities List
NPDES	National Pollutant Discharge Elimination System
POTW	Public Owned Treatment Works
PSD	Prevention of Significant Deterioration
RCRA	Resource Conservation and Recovery Act
RI/FS	Remedial Investigation/Feasibility Study
RD/RA	Remedial Design and Remedial Action
ROD	Record of Decision
SHPO	State Historic Preservation Officer (Montana)
SIP	State Implementation Plan
TCB	To Be Considered
TU	Turbidity Unit
UIC	Underground Injection Control

INTRODUCTION

Section 121(d) of CERCLA, 42 U.S.C. § 9621(d), certain provisions of the current National Contingency Plan (the NCP), 40 CFR Part 300 (1990), and guidance and policy issued by the Environmental Protection Agency (EPA) require that remedial actions taken pursuant to Superfund authority shall require or achieve compliance with substantive provisions of applicable or relevant and appropriate standards, requirements, criteria, or limitations from state environmental and facility siting laws, and from federal environmental laws, at the completion of the remedial action, during the implementation of the remedial action, or both, depending on the nature of the requirements, unless a waiver is granted¹. If contaminant or location specific ARARs are not being met before the commencement of a remedial action, it is not necessary to invoke a waiver to justify their non-attainment during the action; although they must be obtained (or appropriately waived) for remedial action to be complete and the remedy to be successful². These requirements are threshold standards that any selected remedy must meet, unless adequate basis for a waiver is present. See Section 121 (d) (4) of CERCLA, 42 U.S.C. § 9621 (d) (4); 40 CFR § 300.430 (f) (1). EPA calls standards, requirements, criteria, or limitations identified pursuant to section 121 (d) "ARARs," or applicable or relevant and appropriate requirements.

ARARs are either applicable or relevant and appropriate. Applicable requirements are those standards, requirements, criteria, or limitations promulgated under federal or state environmental or facility siting laws that specifically address a hazardous substance, pollutant, or contaminant, remedial action, location, or other circumstance found at a CERCLA site. 40 CFR § 300.5. Relevant and appropriate requirements are those standards, requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that, while not "applicable" to hazardous substances, pollutants, contaminants, remedial actions, locations, or other circumstances found at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site such that their use is well suited to the particular site. Id. Factors which may be considered in making this determination are

¹ See 55 Fed.Reg. 8666, 8755 (March 8, 1990)

² EPA CERCLA Compliance with Other Laws Manual 1-8 (OSWER 9234.1-01, August 1988)

presented in 40 CFR 300.400(g) (2). Compliance with both applicable and relevant and appropriate requirements is mandatory, unless compliance is waived. 42 U.S.C. § 121(d)(4); 40 CFR 300.430(f)(1)(C).

Each ARAR or group of related ARARs identified here is followed by a specific statutory or regulatory citation, a classification describing whether the ARAR is applicable or relevant and appropriate, and a description which summarizes the requirements, and addresses how and when compliance with the ARAR will be measured (some ARARs will govern the conduct of the remedial action, some will define the measure of success of the remedial action, and some will do both)³. The descriptions given here are provided to allow the user a reasonable understanding of the requirements without having to refer constantly to the statute or regulation itself. However in the event of any inconsistency between the law and the summary provided in this document, the applicable or relevant and appropriate requirement is ultimately the requirement as set out in the law, rather than any paraphrase of the law provided here.

Also contained in this list are policies, guidance or other sources of information which are "to be considered" in the selection of the remedy and implementation of the record of decision (ROD). Although not enforceable requirements, these documents are important sources of information which EPA and the State of Montana Department of Environmental Quality (DEQ) may consider during selection of the remedy, especially in regard to the evaluation of public health and environmental risks; or which will be referred to, as appropriate, in selecting and developing cleanup actions.

Finally, this list contains a non-exhaustive list of other legal provisions or requirements which should be complied with during the implementation of the ROD⁴.

ARARs are divided into contaminant specific, location specific, and action specific requirements, as described in the NCP and EPA guidance. For contaminant specific ARARs, ARARs are listed according to the appropriate media.

Contaminant specific ARARs include those laws and regulations governing the release to the environment of materials possessing certain chemical or physical characteristics or containing specific chemical compounds. Contaminant specific ARARs generally

³ 40 CFR § 300.435(b)(2); Preamble to the Proposed NCP, 53 Fed.Reg. 51440 (December 21, 1988); Preamble to the Final NCP, 55 Fed.Reg. 8755-8757 (March 8, 1990)

⁴ 40 CFR § 300.400(g)(3); 40 CFR § 300.515(h)(2); Preamble to the Final NCP, 55 Fed.Reg. 8744-8746 (March 8, 1990)

set health or risk based numerical values or methodologies which, when applied to site-specific conditions, result in the establishment of numerical values. These values establish the acceptable amount or concentration of a chemical that may be found in, or discharged to, the ambient environment. Location specific ARARs are restrictions placed on the concentration of hazardous substances or the conduct of cleanup activities because they are in specific locations. Location specific ARARs related to the geographic or physical position of the site, rather than to the nature of site contaminants. Action specific ARARs are usually technology or activity based requirements or limitations on actions taken with respect to hazardous substances.

Only the substantive portions of the requirements are ARARs⁵. Administrative requirements are not ARARs and thus do not apply to actions conducted entirely on-site. Administrative requirements are those which involve consultation, issuance of permits, documentation, reporting, record keeping, and enforcement. The CERCLA program has its own set of administrative procedures which assure proper implementation of CERCLA. The application of additional or conflicting administrative requirements could result in delay or confusion⁶. Provision of statutes or regulations which contain general goals that merely express legislative intent about desired outcomes or conditions but are non-binding are not ARARs.⁷.

Many requirements listed here are promulgated as identical or nearly identical requirements in both federal and state law, usually pursuant to delegated environmental programs administered by both EPA and the states, such as many of the requirements of the federal Clean Water Act and the Montana Water Quality Act. The Preamble to the final NCP states that such a situation results in citation to the state provision as the appropriate standard, but treatment of the provisions as a federal requirement. ARARs and other laws which are unique to state law are identified separately by the State of Montana.

This list constitutes EPA's and DEQ's detailed description of potential ARARs for use in the feasibility study for the Silver Bow Creek/Butte Area (Butte Portion) Site, Butte Priority Soils operable unit, and resulting remedial action decisions. This list will be used in evaluating the compliance of the various remedial

⁵ 40 CFR § 300.5. See also Preamble to the Final NCP, 55 Fed.Reg. 8756-8757 (March 8, 1990)

⁶ Preamble to the Final NCP, 55 Fed.Reg. 8756-8757 (March 8, 1990); Compliance with Other Laws Manual, Vol.1, pp. 1-11 - 1-12

⁷ Preamble to the Final NCP, 55 Fed.Reg. 8746 (March 8, 1990)

alternatives with ARARs. However, the final determination of ARARs that will ultimately apply to the operable unit and the final determination of compliance with ARARs or applicability of ARAR waivers will be presented in the ROD.

The ARAR analysis is based on section 121(d) of CERCLA, 42 U.S.C. § 9621 (d); CERCLA Compliance with Other Laws Manual, Volumes I and II; OSWER Directives 9234.1-01 and -02 (August 1988 and August 1989 respectively; various CERCLA ARARs Fact Sheets issued as OSWER Directives; the Preamble to the Proposed NCP, 53 Fed.Reg. 51394 et seq. (December 21, 1988); the Preamble to the Final NCP, 55 Fed.Reg. 8666-8813 (March 8, 1990); and the final NCP, 40 CFR Part 300; other applicable guidances; and the substantive provisions of law discussed in this document.

FEDERAL ARARS

I. FEDERAL CONTAMINANT SPECIFIC REQUIREMENTS

A. Groundwater Standards - Safe Drinking Water Act (Relevant and Appropriate)⁸

The National Primary Drinking Water Standards (40 CFR Part 141), better known as maximum contaminant levels and maximum contaminant level goals (MCLs and MCLGs), are not applicable to the Butte Priority Soils Operable Unit (BPSOU) because the aquifer underlying the area is not a current public water system, as defined in the Safe Drinking Water Act, 42 U.S.C. § 300f(4). These standards are relevant and appropriate standards, however, because the groundwater in the alluvial aquifer is a potential source of drinking water.

According to the Butte-Silver Bow Health Department only one well within the BPSOU is used as a source of drinking water. EPA has determined that a waiver of ground water standards is appropriate for the area within the zone defined in the Technical Impracticability Evaluation for the BPSOU (EPA 2006) for all standards⁹. The waiver is based on section 121(d)(4)(C) of CERCLA, 42 U.S.C. Section 9621(d)(4)(C) and corresponding NCP provisions. Outside of the zone, the standards do apply. EPA

⁸ 42 U.S.C. §§ 300f et seq.

⁹ The Technical Impracticability ARAR waiver would also apply to the prohibition on the disposal or storage of tailings/mine wastes/toxic or hazardous materials in the floodplain to the extent that any part of the remedial action for wastes left in place in the floodplain would constitute the active management or storage of those wastes.

notes that the aquifer discharges to Silver Bow Creek which is designated as a potential source of drinking water. Since Silver Bow Creek is also a potential source of drinking water, these standards are relevant and appropriate for that surface water as well.

Use of these standards for this action outside of the TI waiver zone is fully supported by EPA regulations and guidance. The Preamble to the NCP clearly states that MCLs are relevant and appropriate for groundwater that is a current or potential source of drinking water (55 Fed.Reg. 8750, March 8, 1990), and this determination is further supported by requirements in the regulations governing conduct of the RI/FS studies found at 40 CFR § 300.430(e)(2)(i)(B). EPA's guidance on Remedial Action for Contaminated Groundwater at Superfund Sites states that "MCLs developed under the Safe Drinking Water Act generally are ARARs for current or potential drinking water sources." MCLGs which are above zero are relevant and appropriate under the same conditions (55 Fed.Reg. 8750-8752, March 8, 1990). See also, State of Ohio v. EPA, 997 F.2d 1520 (D.C. Cir. 1993), which upholds EPA's application of MCLs and non-zero MCLGs as ARAR standards for groundwater which is a potential drinking water source.

As noted earlier, standards such as the MCL and MCLG standards are promulgated pursuant to both federal and state law. Under the Safe Drinking Water Act, EPA has granted the State of Montana primacy in implementation of the Safe Drinking Water Act. The State has promulgated its own public water supply ground water standards through the Public Water Safety Act for most contaminants of concern, primarily through incorporation by reference of the federal standard. These standards are also identified here.

<u>Chemical</u>	<u>MCLG</u>	<u>MCL</u>
Arsenic	NA	10 ug/l ¹⁰
Cadmium	5 ug/l ¹¹	5 ug/l ¹²
Copper	1300 ug/l ¹³	1300 ug/l ¹⁴
Lead	NA ¹⁵	15 ug/l ¹⁶
Mercury	2 ug/l	2 ug/l

These standards incorporate potentially relevant and appropriate Resource Conversation Act (RCRA) standards for groundwater ground at 40 CFR Part 264, Subpart F, which is incorporated pursuant to state law at ARM 17.54.702. The RCRA standards are the same or less stringent than the MCLs or MCLGs identified above.

B. Surface Water - Ambient and Point Source Discharges - Clean Water Act. (Applicable or Relevant and Appropriate)

CERCLA and the NCP provide that federal water pollution criteria that match designated or anticipated surface water uses are the usual surface water standards to be used at Superfund cleanups, as relevant and appropriate standards, unless the state has promulgated surface water quality standards pursuant to the delegated state water quality act. The State of Montana has designated uses for Silver Bow Creek, and has promulgated specific numeric water quality standards accordingly. Those standards as well as other surface water standards are included in the State ARARs identified below. These standards will be applied to all chemicals of concern identified in the BPSOU remedial investigation, both to point sources affected or created by the BPSOU cleanup and to ambient water in the BPSOU. If State standards are changed to be less stringent than existing Federal Water Quality Criteria (FWQC), then FWQC will be identified as

¹⁰ See 66 FR 6976 (January 22, 2001) and 66 FR 28341 - 28350 (May 22, 2001); 40 CFR § 141.11 and 40 CFR § 141.62.

¹¹ 40 CFR § 141.51

¹² 40 CFR § 141.62

¹³ 40 CFR § 141.51

¹⁴ 40 CFR § 141.80(c) The requirement is an action level rather than a simple numerical standard.

¹⁵ The MCLG for lead is zero, which is not an appropriate standard for Superfund site cleanups.

¹⁶ 40 CFR § 141.80(c). The requirement is an action level rather than a simple numerical standard.

the appropriate ARARs. FWQC may also become replacement standards for State standards if appropriate waivers are invoked for the state standards. The FWQC standards are identified here.

<u>Chemical</u>	<u>FWQC¹⁷ CMC (acute)</u>	<u>FWQC CCC (chronic)</u>
Aluminum	750 ug/l	87 ug/l (pH 6.5 - 9.0, Non-Priority Pollutant)
Arsenic	340 ug/l	150 ug/l
Cadmium	4.3 ug/l	2.2 ug/l
Copper	13 ug/l	9.0 ug/l
Iron	NA	1000 ug/l (Non-Priority Pollutant)
Lead	65 ug/l	2.5 ug/l
Mercury	1.4 ug/l	0.77 ug/l
Silver	3.4 ug/l	NA
Zinc	120 ug/l	120 ug/l

C. Surface Water - Point Source Discharges - Stormwater Regulations - Clean Water Act. (Applicable)

If point sources of water contamination are retained or created by any BPSOU remediation activity, applicable Clean Water Act standards would apply to those discharges. These include the general requirements and storm water regulations found at 40 CFR Parts 122 and 125 (general conditions and industrial activity conditions). The storm water regulations address non-agricultural sources of storm water discharges which adversely affect water quality. Generally, the permits require the permittee to implement Best Management Practices (BMP) and to take all reasonable steps to minimize or prevent any discharge which has a reasonable likelihood of adversely affecting human health or the environment.¹⁸ However, if there is evidence indicating potential or realized impacts on water quality due to any storm water discharge associated with the activity, substantive standards associated with an individual National Pollutant Discharge Elimination System (NPDES) permit or alternative general permit may be required (or Montana Pollutant Discharge Elimination System (MPDES) permit or alternative general permit under the State program).

D. Air Standards - Clean Air Act (Applicable)

¹⁷ Pursuant to Section 304(a) of the Clean Water Act. National Recommended Water Quality Criteria- Correction. US EPA, EPA 822-Z-99-001, April 1999.

¹⁸ For further explanation of storm water applications, see the letter from EPA to Chuck Stilwell, ARCO, dated February 2, 1999, which describes that treatment, in addition to BMPs, may be necessary if in-stream standards are not met after implementation of BMPs.

Federal air quality standards are not currently exceeded in the BPSOU. Limitations on air emissions resulting from cleanup activities or emissions resulting from wind erosion of exposed hazardous substances are set forth-in the action specific requirements, below.

II. FEDERAL LOCATION SPECIFIC REQUIREMENTS

A. Fish and Wildlife Coordination Act (Applicable)

These standards are found at 16 U.S.C. §§ 661 et seq. and 40 CFR § 6.302(g) . They require that federally funded or authorized projects ensure that any modification of any stream or other water body affected by a federally funded or authorized action provide for adequate protection of fish and wildlife resources. Compliance with this ARAR necessitates EPA consultation with the U.S. Fish and Wildlife Service (USFWS) and the State of Montana Department of Fish, Wildlife, and Parks. Further consultation with these agencies will occur during cleanup selection and implementation, and specific mitigative or other measures may be identified to achieve compliance with this ARAR, if streambank or streambed measures are chosen. The purpose of consultation is to develop measures to prevent, mitigate, or compensate for project-related losses to fish and wildlife. Mitigative measures must be performed by the persons who implement any selected remedy.

B. Floodplain Management Order (Applicable)

This requirement (40 CFR Part 6, Appendix A, Executive Order No. 11,988) mandates that federally funded or authorized actions within the 100 year floodplain avoid, to the maximum extent possible, adverse impacts associated with development of a floodplain. Compliance with this requirement is detailed in EPA's August 6, 1985 "Policy on Floodplains and Wetlands Assessments for CERCLA Actions." If the selected remedial action adversely impacts the Silver Bow Creek floodplain, specific measures to minimize adverse impacts may be identified following EPA consultation with the appropriate agencies.

In addition, if the remedial action selected for the BPSOU is found to potentially adversely impact the floodplain, the following information will be produced: a Statement of Findings which will set forth the reasons why the proposed action must be located in or affect the floodplain; a description of significant facts considered in making the decisions to locate in or affect the floodplain or wetlands including alternative sites or actions; a statement indicating whether the selected action conforms to applicable state or local floodplain protection standards; a description of the steps to be taken to design or modify the proposed action to minimize the potential harm to or

within the floodplain; and a statement indicating how the proposed action affects the natural or beneficial values of the floodplain.

C. Protection of Wetlands Order (Applicable)

This requirement (40 CFR Part 6, Appendix A, Executive Order No. 11,990) mandates that federal agencies and potentially responsible parties (PRPs) avoid, to the extent possible, the adverse impacts associated with the destruction or loss of wetlands and to avoid support of new construction in wetlands if a practicable alternative exists. Section 404(b)(1), 33 U.S.C. § 1344(b)(1), also prohibits the discharge of dredged or fill material into waters of the United States. Together, these requirements create a "no net loss" of wetlands standard.

Compliance with this ARAR will be achieved through EPA consultation with the U.S. Fish and Wildlife Service, to determine the existence and category of wetlands present at the site, and any avoidance or mitigation and replacement which may be necessary. Avoidance, mitigation, or replacement activities will be done by the persons who implement any selected remedy. Avoidance or mitigation and replacement of wetlands must be addressed in remedy selection and implementation. In July 1993, ARCO published a report titled "Wetlands and Threatened/Endangered Species Inventory with Determination of Functionally Effective Wetland Area" EPA also approved ARCO's August 1992 Evaluation Form for Determining Wetland Functional Value and Effective Wetland Area in Upper Clark Fork River superfund Sites for use in wetland evaluations.

D. The Endangered Species Act (Applicable)

This statute and implementing regulations (16 U.S.C. §§ 1531 - 1544, 50 CFR Part 402, and 40 CFR § 6.302(h)) require that any federal activity or federally authorized activity may not jeopardize the continued existence of any threatened or endangered species known to live or to have lived in the affected environment or destroy or adversely modify a critical habitat. This ARAR requires EPA to ensure that the selected remedy is sufficiently protective of the environment containing the threatened or endangered species, with an emphasis on reducing the risks from the contaminants of concern to the listed species described in the EPA risk assessment to an acceptable level, with consideration given to the special status of the listed or threatened species - see 40 CFR Sections 300.430(d)(2)(vii) and (e)(2)(i)(G) and EPA Guidance Document OSWER Dir. No. 9285.7-28P, Ecological Risk Assessment and Risk Management principles for Superfund Sites (October, 1999) page 3; and to ensure that the selected remedy is implemented in a manner that effects on any existing the threatened or endangered species from the active

remedy implementation activities are avoided or mitigated - see page 4-12 of the CERCLA Compliance with Other Laws Manual: Volume II (EPA August 1989).

Compliance with this ARAR has to date involved consultation with USFWS, and a determination of the presence of listed or proposed species or critical habitats present at the BPSOU. The USFWS has indicated that general and informal consultation only is required for this ARAR at this operable unit, and that a full biological assessment and biological opinion will not be necessary. In July 1993, ARCO published a report titled "Wetlands and Threatened/Endangered Species Inventory with Determination of Functionally Effective Wetland Area". The bald eagle and the peregrine falcon were identified as potentially occurring at the BPSOU. Subsequently, the bull trout was listed by the FWS as a threatened species.

E. The National Historic Preservation Act (Applicable)

This statute and implementing regulations (16 U.S.C. § 470 et seq., 40 CFR § 6.301(b), 36 CFR Part 800) require federal agencies or federal projects to take into account the effect of any federally assisted undertaking or licensing on any district, site building, structure, or object that is included in, or eligible for, the Register of Historic Places. If effects cannot be avoided reasonably, measures should be implemented to minimize or mitigate the potential effect. In addition, Indian cultural and historical resources must be evaluated, and effects avoided, minimized, or mitigated.

Compliance with this ARAR has been described in the First and Second Programmatic Agreements (Programmatic Agreement, April 6, 1992 and Second Programmatic Agreement, December 14, 1994) and various mitigative and replacement measures have been undertaken under those agreements. The Second Programmatic Agreement also describes a notification and consultation process, which must be observed during remedial design and remedial action activities at BPSOU. The Salish and Kootenai Confederated Tribe (the Tribe) is currently cataloguing protected Indian resources, in partial compliance with this ARAR, and additional consultation measures may be required involving the Tribe.

F. Archaeological and Historic Preservation Act (Applicable)

The statute and implementing regulations (16 U.S.C. § 469 et seq., 40 CFR § 6.301(c)) establish requirements for evaluation and preservation of historical and archaeological data, including Indian cultural and historic data, which may be destroyed through alteration of terrain as a result of federal construction projects or a federally licensed activity or program. If eligible

scientific, prehistorical, or archaeological data are discovered during site activities, they must be preserved in accordance with these requirements.

G. Historic Sites, Buildings, and Antiquities Act
(Applicable)

This statute and implementing regulations (16 U.S.C. § 461 et seq., 40 CFR § 6.310(a)) state that in conducting an environmental review of a proposed EPA action, the responsible official shall consider the existence and location of natural landmarks using information provided by the National Park Service pursuant to 36 CFR § 62.6(d) to avoid undesirable impacts upon such landmarks.

H. Migratory Bird Treaty (Applicable)

This requirement (16 U.S.C. §§ 703 et seq.) establishes a federal responsibility for the protection of the international migratory bird resource and requires continued consultation by EPA with the USFWS during remedial design and remedial construction to ensure that the cleanup of the site does not unnecessarily impact migratory birds. Specific mitigative measures may be identified for compliance with this requirement as appropriate for performance by the persons who implement the remedy.

I. Bald Eagle Protection Act (Applicable)

This requirement (16 U.S.C. §§ 668 et seq.) establishes a federal responsibility for protection of bald and golden eagles, and requires continued consultation by EPA with the USFWS during remedial design and remedial construction to ensure that any cleanup of the site does not unnecessarily adversely affect the bald and golden eagle. Specific mitigative measures may be identified for compliance with this requirement as appropriate, and will be done by the persons who implement any selected remedy.

J. Resource Conservation and Recovery Act
(Relevant and Appropriate)

Any discrete waste units created or actively managed by the BPSOU site cleanup must comply with the siting restrictions and conditions at 40 CFR § 264.18 (a) and (b). These sections require management units to be designed, constructed, operated, and maintained to avoid washout, if they are within or near the current 100 year flood plain.

K. Native American Grave Protection and Repatriation Act, 25 U.S.C. § 3001; 43 CFR §§ 10.1 - 10.17 (Applicable or Relevant and Appropriate)

NAGPRA and its implementing regulations provide for the disposition of Native American remains and objects inadvertently discovered on federal or tribal lands after November, 1990. 25 U.S.C. Section 3002(d). If the response activities result in the discovery of Native American human remains or related objects, the activity must stop while the head of the federal land management agency (if federal lands are involved) and appropriate Indian tribes are notified of the discovery. After the discovery, the response activity must cease and a reasonable effort must be made to protect the Native American human remains or related objects. The response activity may later resume. 42 CFR Section 10.4. Accordingly, depending on the facts of the discovery and the location of the response action, NAGPRA could be applicable or relevant and appropriate to the response action.

III. FEDERAL ACTION SPECIFIC REQUIREMENTS

A. Solid Waste (Applicable), Surface Mining Control and Reclamation (Relevant and Appropriate), and RCRA (Relevant and Appropriate) Requirements

The contamination at the BPSOU is primarily mining waste from mining mills and smelters in Butte. This waste may not be RCRA hazardous waste, although EPA reserves its rights to make a more formal determination in this regard at a later date. For any active management (i.e., treatment, storage, disposal, grading, or in-situ treatment) or removal of tailings or mixed tailings and soils¹⁹ contamination, the following requirements are ARARs.

1. Requirements described at 40 CFR §§ 257.3-1(a), 257.3-3, and 257.3-4, governing waste handling, storage, and disposal, including retention of the waste, in general²⁰, and 257.3-5, relating to precautions necessary to ensure that cadmium is not taken up into crops, including pasture grasses that may enter the food chain.

2. For any discrete waste units which are created or actively managed by the BPSOU cleanup, reclamation and closure regulations found at 30 CFR Parts 816 and 784, governing coal and to a lesser extent, non-coal mining, are relevant and appropriate requirements²¹.

¹⁹ Federal and State solid waste requirements would be relevant and appropriate for contaminated soils if these materials are not used in conjunction with other removal or remedial measures such as deep plowing.

²⁰ Solid waste regulations are promulgated pursuant to the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. They are applicable regulations, although the State of Montana has the lead role in regulating solid waste disposal in the State of Montana.

²¹ The Surface Mining Control and Reclamation Act is promulgated at 30 U.S.C. §§ 1201 -

3. RCRA regulations found at 40 CFR §§ 264.116 and .119 (governing notice and deed restrictions), 264.228(a)(2)(ii) (addressing de-watering of wastes prior to disposal), and 264.228(a)(2)(iii)(B), (C), and (D) and .251(c), (d), and (f) (regarding run-on and run-off controls), are relevant and appropriate requirements for any waste management units created or actively managed at the BPSOU²².

B. Air Standards - Clean Air Act (Applicable)

These standards, promulgated pursuant to section 109 of the Clean Air Act²³, are applicable to releases into the air from any BPSOU cleanup activities.

1. Lead: No person shall cause or contribute to concentrations of lead in the ambient air which 3 exceed 1.5 micrograms per cubic meter (ug/m) of air, measured over a 90-day average. These standards are promulgated at ARM 17.8.222 as part of a federally approved State Implementation Plan (SIP), pursuant to the Clean Air Act of

1326.

²² As noted earlier, federal RCRA regulations are incorporated by reference into applicable State Hazardous Waste Management Act regulations. See ARM 17.53.801. Use of select RCRA regulations for mining waste cleanups is appropriate when discrete units are addressed by a cleanup and site conditions are distinguishable from EPA generic determination of low toxicity/high volume status for mining waste. See Preamble to the Final NCP, 55 Fed.Reg. 8763 - 8764 (March 8, 1990), CERCLA Compliance with Other Laws Manual, Volume II (August 1989 OSWER Directive #9234.1-02) p. 6-4; Preamble to the Proposed NCP, 53 Fed.Reg. 51447 (Dec. 21, 1988); and guidance entitled Consideration of RCRA Requirements in Performing CERCLA Responses at Mining Wastes Sites, August 19, 1986 (OSWER).

²³ 42 U.S.C. §§ 7401 et seq.

Montana, §§ 75-2-101 et seq. MCA. Corresponding federal regulations are found at 40 CFR § 50.12²⁴.

2. Particulate matter that is 10 microns in diameter or smaller (PM-10): No person shall cause or contribute to concentrations of PM-10 in the ambient air which exceed:

- 150 ug/m3 of air, 24 hour average, no more than one expected exceedance per calendar year;
- 50 ug/m3 of air, annual average.

These regulations are promulgated at ARM 17.8.223 as part of a federally approved SIP, pursuant to the Clean Air Act of Montana, §§ 75-2-101 et seq. MCA. Corresponding federal regulations are found at 40 CFR § 50.6.

Ambient air standards under section 109 of the Clean Air Act are also promulgated for carbon monoxide, hydrogen sulfide, nitrogen dioxide, sulfur dioxide, and ozone. If emissions of these compounds were to occur at the site in connection with any cleanup action, these standards would also be applicable. See ARM 17.8.222 and .223, and 40 CFR Part 50.

²⁴ Ambient air standards established as part of Montana's approved State Implementation Plan in many cases provide more stringent or additional standards. The federal standards by themselves apply only to major sources, while the State standards are fully applicable throughout the state and are not limited to major sources. See ARM 17.8.205 and 17.8.212-.223. As part of an EPA approved State Implementation Plan, the state standards are also federally enforceable. Thus, the state standards which are equivalent to the federal standards are identified in this section. A more detailed list of State standards, which include standards which are not duplicated in federal regulations, is contained in the State ARAR identification section.

C. Point Source Controls - Clean Water Act (Applicable)

If point sources of water contamination are retained or created by any BPSOU remediation activity, applicable Clean Water Act standards would apply to those discharges. The regulations are discussed in the contaminant specific ARAR section, above, and in the State of Montana identification of ARARs. These regulations would include storm water runoff regulations found at 40 CFR Parts 121, 122, and 125 (general conditions and industrial activity conditions). These would also include requirements for best management practices and monitoring found at 40 CFR §§ 122.44(i) and 440.148, for point source discharges.

D. Dredge and Fill Requirements (Applicable)

Regulations found at 40 CFR Part 230 address conditions or prohibitions against depositing dredge and fill material into water of the United States. If remediation activities would result in an activity subject to these regulations, they would be applicable. Compliance with this requirement will be achieved at the site of dredge and fill activity within the BPSOU during construction activities.

E. Underground Injection Control (Applicable)

Requirements found at 40 CFR Part 144, promulgated pursuant to the Safe Drinking Water Act, allow the re-injection of treated groundwater into the same formation from which it was withdrawn for aquifers such as the aquifer beneath the reservoir sediments operable unit, and addresses injection well construction, operation, maintenance, and capping/closure. These regulations would be applicable to any reinjection of treated groundwater.

F. Transportation of Hazardous or Contaminated Waste
(Relevant and Appropriate)

40 CFR Part 263 establishes regulations for the transportation of hazardous waste. These regulations would govern any on-site transportation of contaminated material. Any off-site transportation would be fully subject to applicable regulations and permitting.

STATE OF MONTANA ARARS

As provided by Section 121 of CERCLA, 42 U.S.C. § 9621, only those state standards that are more stringent than any federal standard and that have been identified by the state in a timely manner are appropriately included as ARARs. DEQ has identified some state standards that are potentially duplicative of federal standards to ensure their timely identification and consideration in the event that they are not identified or retained in the federal ARARs. Duplicative or less stringent standards will be deleted as appropriate when the final determination of ARARs is presented.

IV. MONTANA CONTAMINANT SPECIFIC REQUIREMENTS

A. Water Quality

1. Surface Water Quality Standards (Applicable)

Under the Montana Water Quality Act, §§ 75-5-101 et seq., MCA, the state has promulgated water quality standards to protect, maintain, and improve the quality and potability of the state's surface water for water supplies, wildlife, fish and aquatic life, agricultural, industry, recreation, and other beneficial uses. The requirements listed below are applicable water quality standards with which any remedial action must comply.

ARM 17.30.607(1)(a)(iii)(Applicable) provides that Silver Bow Creek (mainstem) from the confluence of Blacktail Creek to Warm Springs Creek is classified "I" for water use. Waters in the operable unit that are not specifically listed under 17.30.607(1)(a), for example, Blacktail Creek, are classified B-1.

The "I" classification standards are contained in ARM 17.30.628 (Applicable) of the Montana water quality regulations. This section states:

[T]he goal of the state of Montana is to have these waters fully support the following uses: drinking, culinary, and food processing purposes after conventional treatment; bathing, swimming, and recreation; growth and propagation of fishes and associated aquatic life, waterfowl, and furbearers; and agricultural and industrial water supply.

These beneficial uses are considered supported when the concentrations of toxic, carcinogenic, or harmful parameters in these waters do not exceed the applicable standards specified in department Circular DEQ-7 when stream flows equal or exceed the stream flows specified in ARM 17.30.635(4) (10-year 7-day low flow, i.e., minimum consecutive 7-day average flow which may be expected to occur on the average of once in 10 years).²⁵ These standards set the contaminant specific requirement for ambient water quality in the stream.

To allow a gradual attainment of these requirements in already impacted streams, the I classification allows point source discharges to be permitted at the higher concentration of (1) the applicable standards specified in department Circular DEQ-7, (2) the site-specific standards, or (3) one-half of the mean in-stream concentrations immediately upstream of the discharge point. This effectively requires eventual attainment of the Circular DEQ-7 levels in the stream, while allowing consideration of the current, impacted stream quality (a graduated reduction of point source discharge concentrations based on the mean in-stream concentration where the stream is substantially degraded). As the quality of the stream improves due to control of other sources, including cleanup of non-point source areas, point source dischargers must improve the quality of their discharges down to the in-stream standards (either DEQ-7 or, for aquatic life only, site specific standards).

ARM 17.30.623 (Applicable) requires that waters classified B-1 are to be maintained suitable for drinking, culinary and food processing purposes after conventional treatment, bathing, swimming and recreation, growth and propagation of salmonid fishes and associated aquatic life, waterfowl and furbearers, and agricultural and industrial water supply.

This section provides that concentrations of carcinogenic, bioconcentrating, toxic or harmful parameters which would remain in water after conventional water treatment may not exceed standards set forth in department circular DEQ-7. Discharges may not cause receiving water concentrations to exceed the applicable standards specified in DEQ-7 when stream flows equal or exceed the design flows specified in ARM 17.30.635(4) and also must conform with ARM Title 16, Chapter 20, Subchapter 7 (the nondegradation rules).

²⁵ Alternatively, site-specific criteria may be developed using the procedures given in the Water Quality Standards Handbook, Second Edition (EPA-823-B-94-005a), provided that other routes of exposure to toxic parameters by aquatic life are addressed. Such other routes of exposure in this operable unit would include, for example, contaminated sediment/food chain routes of exposure. However, no site specific standards have been developed for Silver Bow Creek to date, and the applicable numeric standards are those set forth in DEQ-7.

The B-1 classification standards at ARM 17.30.623 also include the following criteria: 1) dissolved oxygen concentration must not be reduced below the levels given in department circular DEQ-7; 2) induced variation of hydrogen ion concentration (pH) within the range of 6.5 to 8.5 must be less than 0.5 pH unit. Natural pH outside of this range must be maintained without change. Natural pH above 7.0 must be maintained above 7.0; 3) the maximum allowable increase above naturally occurring turbidity is 5 nephelometric turbidity units except as permitted in 75-5-318, MCA; 4) temperature increases must be kept within limits prescribed in this section; 5) no increases above naturally occurring concentrations of sediment or suspended sediment, settleable solids, oils, floating solids, which will or are likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish or other wildlife are allowed; 6) true color must not be increased more than five units above naturally occurring color.

To the extent any of these standards are violated due to hazardous substances or Superfund response action, they must be complied with as part of any selected remedial action.

With respect to the remediation of non-point sources, the DEQ-7 standards effectively set the ambient water quality standards that are to be attained by the remedial action. As an ambient standard, the point of compliance for these standards would be throughout the stream, and compliance should be measured by monitoring at several different points within the stream, as determined by any significant point sources or significant reaches of non-point sources.

For the primary contaminants of concern, the DEQ-7 levels are listed below. DEQ-7 provides that "whenever both Aquatic Life Standards and Human Health Standards exist for the same analyte, the more restrictive of these values will be used as the numeric Surface Water Quality Standard." Surface water is measured in total recoverable form, according to DEQ-7.

<u>Chemical</u>	<u>DEQ-7²⁶ Standards (total recoverable form, except as noted)</u>
Aluminum (dissolved)	750 ug/l acute (pH 6.5-9.0) 87 ug/l chronic (pH 6.5-9.0)
Arsenic	340 µg/l acute 150 ug/l chronic 10 ug/l human health

²⁶ Circular DEQ-7, Montana Numeric Water Quality Standards, February 2006. See note 12 in DEQ-7 for an explanation of how the standards are a function of total hardness in mg/l CaCO₃.

Cadmium	0.52 ug/l @ 25 mg/l hardness acute 0.097 ug/l @ 25 mg/l hardness chronic 5 ug/l human health
Copper	3.79 ug/l @ 25 mg/l hardness acute 2.85 ug/l @ 25 mg/l hardness chronic 1300 ug/l human health
Iron	1000 ug/l chronic
Lead	13.98 ug/l @ 25 mg/l hardness acute 0.545 ug/l @ 25 mg/l hardness chronic 15 ug/l human health
Mercury	1.7 ug/l acute 0.91 ug/l chronic 0.05 ug/l human health
Silver	0.374 ug/l @ 25 mg/l hardness NA acute
Zinc	37 ug/l @ 25 mg/l hardness acute and chronic

I classification standards also include the following criteria:

1. Dissolved oxygen concentration must not be reduced below 3.0 milligrams per liter.
2. Hydrogen ion concentration (pH) must be maintained within the range of 6.5 to 9.5.
3. No increase in naturally occurring turbidity, temperature, concentrations of sediment or suspended sediment, settleable solids, oils, floating solids, or true color is allowed which will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish or other wildlife.
4. No discharges of toxic, carcinogenic, or harmful parameters may commence or continue which lower or are likely to lower the overall water quality of these waters.

Additional restrictions on any discharge to surface waters are included in:

ARM 17.30.637 (Applicable), which prohibits discharges containing substances that will:

- (a) settle to form objectionable sludge deposits or emulsions beneath the surface of the water or upon adjoining shorelines;
- (b) create floating debris, scum, a visible oil film (or be present in concentrations at or in excess of 10 milligrams per liter) or globules of grease or other floating materials;
- (c) produce odors, colors or other conditions which create a nuisance or render undesirable tastes to fish flesh or make fish inedible;
- (d) create concentrations or combinations of materials which are toxic or harmful to human, animal, plant or aquatic life;
- (e) create conditions which produce undesirable aquatic life.

ARM 17.30.637 states that no waste may be discharged and no activities conducted which, either along or in combination with other waste activities, will cause violation of surface water quality standards.

ARM 17.30.637 also provides that leaching pads, tailing ponds, or water, waste, or product holding facilities must be located, constructed, operated and maintained in such a manner and of such materials to prevent any discharge, seepage, drainage, infiltration, or flow which may result in pollution of state waters, and a monitoring system may be required to ensure such compliance.

ARM 17.30.705 provides that for any surface water, existing and anticipated uses and the water quality necessary to protect these uses must be maintained and protected unless degradation is allowed under the non-degradation rules at ARM 17.30.701 et seq.

ARM 17.30.1203 (Applicable), which adopts and incorporates the provisions of 40 C.F.R. Part 125 for criteria and standards for the imposition of technology-based treatment requirements in MPDES permits. Although the permit requirement would not apply to on-site discharges, the substantive requirements of Part 125 are applicable, i.e., for toxic and non-conventional pollutants treatment must apply the best available technology economically achievable (BAT); for conventional pollutants, application of the best conventional pollutant control technology (BCT) is required. Where effluent limitations are not specified for the particular industry or industrial category at issue, BCT/BAT technology-based treatment requirements are determined on a case by case basis using best professional judgment (BPJ).

See CERCLA Compliance with Other Laws Manual, Vol. I, August 1988, p. 3-4 and 3-7.

Applicable for both surface water and ground water, § 75-5-605, MCA, provides that it is unlawful to cause pollution as defined in 75-5-103 of any state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters. Applicable for both surface water and ground water, § 75-5-303, MCA, states that existing uses of state waters and the level of water quality necessary to protect the uses must be maintained and protected.

Section 75-5-308, MCA, allows DEQ to grant short-term exemptions from the water quality standards or short-term use that exceeds the water quality standards for the purpose of allowing certain emergency environmental remediation activities. Such exemptions typically extend for a period of 30-60 days. However, any exemption must include conditions that minimize to the extent possible the magnitude of the violation and the length of time the violation occurs. In addition, the conditions must maximize the protection of state waters by ensuring the maintenance of beneficial uses immediately after termination of the exemption. Water quality and quantity monitoring and reporting may also be included as conditions.

Montana Pollutant Discharge Elimination System (MPDES) - stormwater and other point sources.

ARM 17.30.1342 - 1344 set forth the substantive requirements applicable to all MPDES permits. The substantive requirements, including the requirement to properly operate and maintain all facilities and systems of treatment and control are applicable requirements.

Under ARM 17.30.601, ARM 17.30.1101 et seq., and ARM 17.30.1301 et seq., the Montana Department of Environmental Quality has issued general stormwater permits for certain activities. Generally, the permits require the permittee to implement Best Management Practices (BMP) and to take all reasonable steps to minimize or prevent any discharge which has a reasonable likelihood of adversely affecting human health or the environment.²⁷ However, if there is evidence indicating potential or realized impacts on water quality due to any storm water discharge associated with the activity, the substantive standards associated with an individual Montana Pollutant Discharge Elimination System (MPDES) permit or alternative general permit may be required. The substantive requirements of the following permits are applicable for the following activities:

²⁷ For further explanation of storm water applications, see the letter from EPA to Chuck Stilwell, ARCO, dated February 2, 1999, which describes that treatment, in addition to BMPs, may be necessary if in-stream standards are not met after implementation of BMPs.

For construction activities: General Permit for Storm Water Discharges Associated with Construction Activity, Permit No. MTR 100000 (June 8, 2002);

For mining activities: General Permit for Storm Water Discharges Associated with Mining and with Oil and Gas Activities, Permit No. MTR300000 (November 17, 2002)²⁸;

For industrial activities: General Permit for Storm Water Discharges Associated with Industrial Activity, Permit No. MTR000000 (October 1, 2001).

Generally, the permits listed above require the permittee to implement Best Management Practices (BMP) and to take all reasonable steps to minimize or prevent any discharge which has a reasonable likelihood of adversely affecting human health or the environment.²⁹ However, if there is evidence indicating potential or realized impacts on water quality due to any storm water discharge associated with the activity, the substantive standards associated with an individual MPDES permit or alternative general permit may be required.

A related mine reclamation requirement is set out in ARM 17.24.633 (relevant and appropriate), which requires that all surface drainage from disturbed areas that have been graded, seeded or planted must be treated by the best technology currently available (BTCA) before discharge. Sediment control through BTCA practices must be maintained until the disturbed area has been reclaimed, the revegetation requirements have been met, and the area meets state and federal requirements for the receiving stream.

²⁸ This permit covers point source discharges of storm water from mining and milling activities (including active, inactive, and abandoned mine and mill sites) including activities with Standard Industrial Code 14 (metal mining).

²⁹ For further explanation of storm water applications, see the letter from EPA to Chuck Stilwell, ARCO, dated February 2, 1999, which describes that treatment, in addition to BMPs, may be necessary if in-stream standards are not met after implementation of BMPs.

2. Groundwater Water Standards

As noted above, EPA has waived all ground water standard within the zone defined in the final BPSOU TI Evaluation document (EPA 2006), pursuant to its authority under CERCLA. The following standards apply outside of the TI waiver zone.

In addition to the standards set forth below, relevant and appropriate MCLs and MCLGs are included in the federal ARARs identified above.

a. Montana Maximum Contaminant Levels (relevant and appropriate)

Pursuant to the Public Water Safety Act, 75-6-101 et seq. MCA and ARM 17.28.203, the MCLS specified in 40 CFR Part 141 (Primary Drinking Water Standards) are incorporated by reference into State law.

b. Groundwater Quality Standards (Applicable)

ARM 17.30.1006 classifies groundwater into Classes I through IV based upon the its specific conductance and establishes the groundwater quality standards applicable with respect to each groundwater classification. Based upon its specific conductance, the majority of the groundwater in the defined alluvial aquifer of the BPSOU is considered Class I or Class II groundwater.³⁰

Concentrations of substances in Class I and Class II groundwater may not exceed the human health standards for groundwater listed in department Circular DEQ-7. For the primary chemicals of concern these levels are listed below.

For concentrations of parameters for which human health standards are not listed in DEQ-7, ARM 17.30.1006 allows no increase of a parameter to a level that renders the waters harmful, detrimental or injurious to listed beneficial uses. For Class I and II groundwaters, 17.30.1006 also allows no increase of a parameter that causes a violation of the nondegradation provisions of § 75-5-303, MCA.

ARM 17.30.1006 (Applicable) establishes the groundwater quality standards applicable with respect to each groundwater classification. Concentrations of dissolved substances in Class I or II groundwater (or Class III groundwater which is used as a

³⁰ ARM 17.30.1006 provides that Class I groundwaters are those with specific conductance of less than 1000 microSiemens per centimeter at 25C C; Class II groundwaters: 1000 to 2500; Class III groundwaters: 2500 to 15,000; and Class IV groundwaters: over 15,000.

drinking water source) may not exceed the human health standards listed in department Circular DEQ-7. For the primary contaminants of concern these levels are listed below. Ground water is measured in dissolved form, according to DEQ-7.

Chemical DEQ-7 Human Health Standards

Arsenic	20 ug/l
Cadmium	5 ug/l
Copper	1300 ug/l
Lead	15 ug/l
Mercury	2 ug/l
Zinc	2000 ug/l

ARM 17.30.1011 provides that groundwater whose existing quality is higher than the standard for its classification must be maintained at that high quality unless degradation may be allowed under the principles established in § 75-5-303, MCA, and the nondegradation rules at ARM 17.30.701 et seq.

An additional concern with respect to ARARs for groundwater is the impact of groundwater upon the surface water. If significant loadings of contaminants from groundwater sources to Silver Bow Creek or other surface water contribute to the inability of the surface water to meet its class standards, then alternatives to alleviate such groundwater loading must be evaluated and, if appropriate, implemented. Groundwater in certain areas may need to be remediated to levels more stringent than the groundwater classification standards in order to achieve the standards for affected surface water. See Compliance with Federal Water Quality Criteria, OSWER Publication 9234.2-09/FS (June 1990) ["Where the ground water flows naturally into the surface water, the groundwater remediation should be designed so that the receiving surface-water body will be able to meet any ambient water-quality standards (such as State WQSS or FWQC) that may be ARARs for the surface water."].

B. Air Quality

In addition to the standards identified in the federal action specific ARARs above, the State of Montana has identified certain air quality standards in the action-specific section of the State ARARs below.

V. MONTANA LOCATION SPECIFIC REQUIREMENTS

A. Floodplain and Floodway Management Act and Regulations (Applicable)

The Floodplain and Floodway Management Act and regulations specify types of uses and structures that are allowed or prohibited in the designated 100-year floodway³¹ and floodplain³².

These standards are applicable to all actions contemplated for this site within the floodplain.

1. Allowed Uses. The law recognizes certain uses as allowable in the floodway and a broader range of uses as allowed in the floodplain. Residential use is among the possible allowed uses expressly recognized in both the floodway and floodplain. "Residential uses such as lawns, gardens, parking areas, and play areas," as well as certain agricultural, industrial-commercial, recreational and other uses are permissible within the designated floodway, provided they do not require structures other than portable structures, fill or permanent storage of materials or equipment. 76-5-401, MCA; ARM 36.15.601.³³ In addition, in the flood fringe (i.e., within the floodplain but outside the floodway), residential, commercial, industrial, and other structures may be permitted subject to certain conditions relating to placement of fill, roads, floodproofing, etc. § 76-5-402, MCA; ARM 36.15.701. Domestic water supply wells may be permitted, even within the floodway, provided the well casing is watertight to a depth of 25 feet and the well meets certain conditions for floodproofing, sealing, and positive drainage away from the well head. ARM 36.15.602(6).

2. Prohibited Uses Uses prohibited anywhere in either the floodway or the floodplain are:

- a. solid and hazardous waste disposal; and
- b. storage of toxic, flammable, hazardous, or explosive materials.

ARM 36.15.605(2) and 36.15.703.

In the floodway, additional prohibitions apply, including prohibition of:

³¹ The floodway is the channel of a watercourse or drainway and those portions of the floodplain adjoining the channel which are reasonably required to carry and discharge the floodwater of the water course or drainway. ARM 36.15.101(13)

³² The floodplain is the area adjoining the water course or drainway which would be covered by the floodwater of a base (110 year) flood except for sheet flood areas that receive less than one foot of water per occurrence. The floodplain consists of the floodway and flood fringe. ARM 36.15.101

³³ However, see EPA's 1997 Human Health Risk Assessment for a determination of likely land use at the CFR OU, based on local zoning requirements and other factors.

- a. a building for living purposes or place of assembly or permanent use by human beings;
- b. any structure or excavation that will cause water to be diverted from the established floodway, cause erosion, obstruct the natural flow of water, or reduce the carrying capacity of the floodway; and
- c. the construction or permanent storage of an object subject to flotation or movement during flood level periods.

Section 76-5-403, MCA.

3. Applicable considerations in use of floodplain or floodway

Applicable regulations also specify factors that must be considered in allowing diversions of the stream, changes in place of diversion of the stream, flood control works, new construction or alteration of artificial obstructions, or any other nonconforming use within the floodplain or floodway. Many of these requirements are set forth as factors that must be considered in determining whether a permit can be issued for certain obstructions or uses. While permit requirements are not directly applicable to remedial actions conducted entirely on site, the substantive criteria used to determine whether a proposed obstruction or use is permissible within the floodway or floodplain are applicable standards. Factors which must be considered in addressing any obstruction or use within the floodway or floodplain include:

1. the danger to life and property from backwater or diverted flow caused by the obstruction or use;
2. the danger that the obstruction or use will be swept downstream to the injury of others;
3. the availability of alternate locations;
4. the construction or alteration of the obstruction or use in such a manner as to lessen the danger;
5. the permanence of the obstruction or use; and
6. the anticipated development in the foreseeable future of the area which may be affected by the obstruction or use.

See 76-5-406, MCA; ARM 36.15.216 (substantive provisions only).

Conditions or restrictions that generally apply to specific activities within the floodway or floodplain are:

1. the proposed activity, construction, or use cannot increase the upstream elevation of the 100-year flood a significant amount (one-half foot or as otherwise determined by the permit issuing authority) or significantly increase flood velocities, ARM 36.15.604 (Applicable, substantive provisions only); and
2. the proposed activity, construction, or use must be designed and constructed to minimize potential erosion, see ARM 36.15.605.

For the substantive conditions and restrictions applicable to specific obstructions or uses, see the following applicable regulations:

- Excavation of material from pits or pools- ARM 36.15.602 (1).
- Water diversions or changes in place of diversion ARM 36.15.603.
- Flood control works - ARM 36.15.606.
- Roads, streets, highways and rail lines (must be designed to minimize increases in flood heights) - ARM 36.15.701(3) (c).
- Structures and facilities for liquid or solid waste treatment and disposal (must be floodproofed to ensure that no pollutants enter flood waters and may be allowed and approved only in accordance with MDEQ regulations, which include certain additional prohibitions on such disposal) - ARM 36.15.701(3) (d).
- Residential structures - ARM 36.15.702(1).
- Commercial or industrial structures - ARM 36.15.702(2).

B. Solid Waste Management Regulations (Applicable)

Regulations promulgated under the Solid Waste Management Act, §§ 75-10-201 et seq. MCA, specify requirements that apply to the location of any solid waste management facility. Under ARM 17.50.505, a facility for the treatment, storage or disposal of solid wastes:

- (a) must be located where a sufficient acreage of suitable land is available for solid waste management;
- (b) may not be located in a 100-year floodplain;
- (c) may be located only in areas which will prevent the pollution of ground and surface waters and public and private water supply systems;

(d) must be located to allow for reclamation and reuse of the land;

(e) drainage structures must be installed where necessary to prevent surface runoff from entering waste management areas; and

(f) where underlying geological formations contain rock fractures or fissures which may lead to pollution of the ground water or areas in which springs exist that are hydraulically connected to a proposed disposal facility, only Class III disposal facilities may be approved³⁴.

Even Class III landfills may not be located on the banks of or in a live or intermittent stream or water saturated areas, such as marshes or deep gravel pits which contain exposed ground water. ARM 17.54.505(2)(j).

In addition, § 75-10-212 prohibits dumping or leaving any debris or refuse upon or within 200 yards of any highway, road, street, or alley of the State or other public property, or on privately owned property where hunting, fishing, or other recreation is permitted. However, the restriction relating to privately owned property does not apply to the owner, his agents, or those disposing of debris or refuse with the owner's consent.

C. Natural Streambed and Land Preservation Standards (Applicable)

Sections 87-5-502 and 504, MCA, (substantive provisions only) provide that a state agency or subdivision shall not construct, modify, operate, maintain or fail to maintain any construction project or hydraulic project which may or will obstruct, damage, diminish, destroy, change, modify, or the natural existing shape and form of any stream or its banks or tributaries in a manner that will adversely affect any fish or game habitat. The requirement that any such project must eliminate or diminish any adverse effect on fish or game habitat is applicable to the state in concurring upon any remedial actions to be conducted. The Natural Streambed and Land Preservation Act of 1975, MCA 75-7-101 et seq. includes substantive requirements and is applicable to private parties as well as government agencies.

³⁴ Group III consist of primarily inert wastes, including industrial mineral wastes which are essentially inert and non-water soluble and do not contain hazardous waste constituents. ARM 17.50.503(1)(b)

While the administrative/ procedural requirements including the consent and approval requirement set forth in these statutes and regulations are not ARARs, the party designing and implementing the remedial action for the CFR OU is encouraged to continue to consult with the Montana Department of Fish, Wildlife and Parks and any conservation district or board of county commissioners (or consolidated city/county government) as provided in the referenced statutes, to assist in the evaluation of factors discussed above.

ARM 36.2.410 establishes minimum standards which would be applicable if a remedial action alters or affects a streambed, including any channel change. Projects must be designed and constructed using methods that minimize adverse impacts to the stream (both upstream and downstream) and future disturbances to the stream. All disturbed areas must be managed during construction and reclaimed after construction to minimize erosion. Temporary structures used during construction must be designed to handle high flows reasonably anticipated during the construction period. Temporary structures must be completely removed from the stream channel at the conclusion of construction and the area must be restored to a natural or stable condition. Channel alternation must be designed to retain original stream length or otherwise provide hydrologic stability. Streambank vegetation must be protected except where removal of such vegetation is necessary for the completion of the project. When removal of vegetation is necessary, it must be kept to a minimum. Riprap, rock, and other material used in a project must be of adequate size, shape and density and must be properly placed to protect the streambank from erosion. The placement of road fill material in a stream, the placement of debris or other materials in a stream where it can erode or float into the stream, projects that permanently prevent fish migration, operation of construction equipment in a stream, and excavation of streambed gravels are prohibited unless specifically authorized by the district. Such projects must also protect the use of water for any useful or beneficial purpose. See 75-7-102, MCA.

VI. MONTANA ACTION SPECIFIC REQUIREMENTS

A. Water Quality Statute and Regulations (Applicable):

Causing of pollution: Section 75-5-605 of the Montana Water Quality Act prohibits the causing of pollution of any state waters. Pollution is defined as contamination or other alteration of physical, chemical, or biological properties of state waters which exceeds that permitted by the water quality standards.

Placement of Wastes: Section 75-5-605, MCA states that it is unlawful to place or caused to be placed any wastes where they will cause pollution of any state waters. Placement of waste is

not prohibited if the authorization for placement contains provisions for review of the placement of materials to ensure it will not cause pollution to state waters.

Nondegradation: Section 75-5-303, MCA states that existing uses of state waters and the level of water quality necessary to protect the uses must be maintained and protected. Section 75-5-317, MCA, provides an exemption from nondegradation requirements which allows changes of existing water quality resulting from an emergency or remedial activity that is designed to protect the public health or the environment and that is approved, authorized, or required by the department. Changes determined to meet these requirements may be considered nonsignificant. In determining that remedial actions are protective of public health and the environment and in approving, authorizing, or requiring such remedial activities, no significant degradation should be approved, considering the criteria for a determination of non-significance set out in 75-5-301(5)(c), which (i) equate significance with the potential for harm to human health, a beneficial use or the environment, (ii) consider both the quantity and strength of the pollutant, (iii) consider the length of time the degradation will occur, and (iv) consider the character of the pollutant so that greater significance is associated with carcinogens and toxins that bioaccumulate or biomagnify and lesser significance is associated with substances that are less harmful or less persistent. Under ARM 17.30.715(1)(b), concentrations of carcinogenic parameters or parameters with a bioconcentration factor greater than 300 cannot exceed the concentration in the receiving water in order for a discharge to be considered nonsignificant and thus exempt from nondegradation requirements under § 75-5-317.

ARM 17.30.705 provides that for any surface water, existing and anticipated uses and the water quality necessary to protect these uses must be maintained and protected unless degradation is allowed under the nondegradation rules at ARM 17.30.701 et seq.

ARM 17.30.1011 provides that any groundwater whose existing quality is higher than the standard for its classification must be maintained at that high quality unless degradation may be allowed under the principles established in § 75-5-303, MCA, and the nondegradation rules at ARM 17.30.701 et seq.

B. Montana Pollutant Discharge Elimination System (MPDES) - stormwater and other point sources.

ARM 17.30.1342 - 1344 set forth the substantive requirements applicable to all MPDES permits. The substantive requirements, including the requirement to properly operate and maintain all facilities and systems of treatment and control are applicable requirements.

Under ARM 17.30.601 et seq., and ARM 17.30.1301 et seq., including ARM 17.30.1332, the Water Quality Division has issued general stormwater permits for certain activities. Generally, the permits require the permittee to implement Best Management Practices (BMP) and to take all reasonable steps to minimize or prevent any discharge which has a reasonable likelihood of adversely affecting human health or the environment.³⁵ However, if there is evidence indicating potential or realized impacts on water quality due to any storm water discharge associated with the activity, an individual Montana Pollutant Discharge Elimination System (MPDES) permit or alternative general permit may be required. The substantive requirements of the following permits are applicable for the following activities:

For construction activities: General Permit for Storm Water Discharge Associated with Construction Activity, Permit No. MTR 100000 (June 8, 2002);

For mining activities: General Discharge Permit for Storm Water Associated with Mining and with Oil and Gas Activities, Permit No. MTR300000 (November 17, 2002)³⁶;

For industrial activities: General Permit for Storm Water Discharge Associated with Industrial Activity, Permit No. MTR000000 (October 1, 2001).

Generally, the permits require the permittee to implement Best Management Practices (BMP) and to take all reasonable steps to minimize or prevent any discharge which has a reasonable likelihood of adversely affecting human health or the environment. However, if there is evidence indicating potential or realized impacts on water quality due to any storm water discharge associated with the activity, an individual MPDES permit or alternative general permit may be required.

A related mine reclamation requirement is set out in ARM 17.24.633 (relevant and appropriate), which requires that all surface drainage from disturbed areas that have been graded, seeded or planted must be treated by the best technology currently available (BTCA) before discharge. Sediment control through BTCA practices must be maintained until the disturbed area has been reclaimed, the revegetation requirements have been

³⁵ For further explanation of storm water applications, see the letter from EPA to Chuck Stilwell, ARCO, dated February 2, 1999, which describes that treatment, in addition to BMPs, may be necessary if in-stream standards are not met after implementation of BMPs.

³⁶ This permit covers point source discharges of storm water from mining and milling activities (including active, inactive, and abandoned mine and mill sites) including activities with Standard Industrial Code 14 (metal mining).

met, and the area meets state and federal requirements for the receiving stream.

C. Air Quality

Air Quality Regulations (Applicable)

Dust suppression and control of certain substances likely to be released into the air as a result of earth moving, transportation and similar actions related to remedial activity at the BPSOU may be necessary to meet air quality requirements. Certain ambient air standards for specific contaminants and particulates are set forth in the federal action specific section above. Additional air quality regulations under the state Clean Air Act, §§ 75-2-101 et seq., MCA, are discussed below.

ARM 17.8.604 (Applicable) lists certain wastes that may not be disposed of by open burning, including oil or petroleum products, RCRA hazardous wastes, chemicals, and treated lumber and timbers. Any waste which is moved from the premises where it was generated and any trade waste (material resulting from construction or operation of any business, trade, industry or demolition project) may be open burned only in accordance with the substantive requirements of 17.8.611 or 612.

ARM 17.8.308 (Applicable) provides that no person shall cause or authorize the production, handling, transportation or storage of any material; or cause or authorize the use of any street, road, or parking lot; or operate a construction site or demolition project, unless reasonable precautions to control emissions of airborne particulate matter are taken. Normally, emissions of airborne particulate matter must be controlled so that they do not "exhibit an opacity of twenty percent (20%) or greater averaged over six consecutive minutes." However, more stringent standards apply to non-attainment areas, including the requirements to apply best available control technology (BACT) for new sources emitting less than 100 tons per year to particulate matter. ARM 17.8.308(4). Under the State Implementation Plan, the Air Quality Permitting Program applies a 5% opacity limit for haul roads. This more stringent limits would apply in Butte, which is a non-attainment area for particulate matter. See also ARM 17.8.304(2) (Applicable).

In addition, state law provides an ambient air quality standard for settled particulate matter. Particulate matter concentrations in the ambient air shall not exceed the following 30-day average: 10 grams per square meter. ARM 17.8.220 (Applicable). Whenever this standard is exceeded, the activity resulting in such exceedance shall be suspended until such time as conditions improve.

ARM 17.24.761 (Relevant and Appropriate) specifies a range of measures for controlling fugitive dust emissions during mining and reclamation activities. Some of these measures could be considered relevant and appropriate to control fugitive dust emissions in connection with excavation, earth moving and transportation activities conducted as part of the remedy at the site. Such measures include, for example, paving, watering, chemically stabilizing, or frequently compacting and scraping roads, promptly removing rock, soil or other dust-forming debris from roads, restricting vehicle speeds, revegetating, mulching, or otherwise stabilizing the surface of areas adjoining roads, restricting unauthorized vehicle travel, minimizing the area of disturbed land, and promptly revegetating regraded lands.

D. Solid Waste Management Regulations (Applicable)

As noted above, the Solid Waste Management Regulations are applicable to the disposal or active management of the tailings and similar wastes within the BPSOU. Certain of these regulations are identified in the state location specific ARARs above. Action specific solid waste regulations are discussed below:

ARM 17.50.505(2) specifies standards for solid waste management facilities, including the requirements that:

1. Class II³⁷ landfills must confine solid waste and leachate to the disposal facility. If there is the potential for leachate³⁸ migration, it must be demonstrated that leachate will only migrate to underlying formations which have no hydraulic continuity with any state waters;

2. adequate separation of group II wastes from underlying or adjacent water must be provided³⁹; and

3. no new disposal units or lateral expansions may be located in wetlands.

ARM 17.50.506 specifies design requirements for landfills⁴⁰. Landfills must either be designed to ensure that MCLs are not exceeded or the landfill must contain a composite liner and leachate collection system which comply with specified criteria.

ARM 17.50.511 sets forth general operational and maintenance and design requirements for solid waste management systems. Specific operational and maintenance requirements specified in ARM 17.50.511⁴¹ that are relevant and appropriate are requirements for run-on and runoff control systems, requirements that sites be fenced to prevent unauthorized access, and prohibitions of point source and nonpoint source discharges which would violate Clean Water Act requirements.

ARM 17.50.523 specifies that solid waste must be transported in such a manner as to prevent its discharge, dumping, spilling or leaking from the transport vehicle.

ARM 17.50.530 sets forth the closure⁴² requirements for landfills. Class II landfills must meet the following criteria:

³⁷ Generally Class II landfills are licensed to receive Group II and Group III waste, but not regulated hazardous waste. Class III landfills may only receive Group III waste.

³⁸ Leachate is defined as a liquid which has contacted passed through, or emerged from solid waste and contains soluble, suspended, or miscible materials removed from the waste. ARM 17.50.502(29).

³⁹ The extent of separation shall be established on a case-by-case basis, considering terrain and the type of underlying soil formations, and facility design. The Waste Management Section of DEQ has generally construed this to require a 10 to 20 foot separation from groundwater.

⁴⁰ Landfills are defined as an area of land or an excavation where wastes are placed for permanent disposal, and is not a land application unit, surface impoundment, injection well, or waste pile. ARM 17.50.502(27).

⁴¹ ARM 17.50.511(1)(j), 17.50.511(1)(k) and 17.50.511(1)(l)

⁴² Closure means the process by which the operator closes all or part of the facility.

1. install a cover that is designed to minimize infiltration and erosion;
2. design and construct the final cover system to minimize infiltration through the closed unit by the use of an infiltration layer that contains a minimum 18 inches of earthen material and has a permeability less than or equal to the permeability of any bottom liner, barrier layer, or natural subsoils or a permeability no greater than 1×10^{-5} cm/sec, whichever is less;
3. minimize erosion of the final cover by the use of a seed bed layer that contains a minimum of six inches of earthen material that is capable of sustaining native plant growth and protecting the infiltration layer from frost effects and rooting damage; and
4. revegetate the final cover with native plant growth within one year of placement of the final cover.

ARM 17.50.530(1)(b) allows an alternative final cover design if the infiltration layer achieves reduction in infiltration at least equivalent to the stated criteria and the erosion layer provides protection equivalent to the stated criteria.

ARM 17.50.531 sets forth post closure care requirements for Class II landfills. Post closure care must be conducted for a period sufficient to protect human health and the environment. Post closure care requires maintenance of the integrity and effectiveness of any final cover, including making repairs to the cover as necessary to correct the effects of settlement, subsidence, erosion, or other events, and preventing run-on and run-off from eroding or otherwise damaging the cover and comply with the groundwater monitoring requirements found at ARM Title 17, chapter 50, subchapter 7.

Section 75-10-206, MCA, allows variances⁴³ to be granted from solid waste regulations if failure to comply with the rules does not result in a danger to public health or safety or compliance with specific rules would produce hardship without producing benefits to the health and safety of the public that outweigh the hardship. In certain circumstances relating to waste nature and volume and the provisions of the Superfund law regarding ongoing maintenance and review, certain of the Solid Waste regulations regarding design of landfills, operational and maintenance requirements, and landfill closure and post-closure care may appropriately be subject to variance for the BPSOU. For example,

⁴³ See the letter from EPA to Chuck Stilwell, ARCO, dated May 21, 2002, which describes the application of variances to solid waste management rules for the Railroad Bed Time Critical Removal Action (TCRA) at the BPSOU.

the barrier layer and leachate collection and removal system requirements of ARM 17.50.506 may be subject to variance as long as the design ensures that concentration values listed in Table 1, ARM 17.50.506, will not be exceeded in the uppermost aquifer, measured at the appropriate location. Similarly, the ground water monitoring requirements of ARM 17.50.701 et seq. can be considered and coordinated with any other monitoring requirements under CERCLA.

E. Reclamation Requirements

The Strip and Underground Mine Reclamation Act, §§ 82-4-201 through 254, MCA, technically applies to coal and uranium mining, but that statute and the regulations promulgated under that statute and discussed in this section set out the standards that mine reclamation should attain. Those requirements identified here have been determined to be relevant and appropriate requirements for this action. Section 82-4-231 (Relevant and Appropriate) requires the reclamation and revegetation of the land as rapidly, completely, and effectively as the most modern technology and the most advanced state of the art will allow. In developing a method of operation and plans of backfilling, water control, grading, topsoiling and reclamation, all measures shall be taken to eliminate damages to landowners and members of the public, their real and personal property, public roads, streams, and all other public property from soil erosion, subsidence, landslides, water pollution, and hazards dangerous to life and property. Sections 82-4-231(10)(j) and (10)(k)(i) and ARM 17.24.751 (Relevant and Appropriate) provide that reclamation of mine waste materials shall, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values and achieve enhancement of such resources where practicable, and shall avoid acid or other toxic mine drainage by such measures as preventing or removing water from contact with toxic producing deposits. ARM 17.24.641 (Relevant and Appropriate) also provides that drainage from acid forming or toxic-forming spoil into ground and surface water must be avoided by preventing water from coming into contact with such spoil. ARM 17.24.505 (Relevant and Appropriate) similarly provides that acid, acid forming, toxic, toxic-forming or other deleterious materials must not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution.

Reclamation Activities - Hydrology Regulations (Relevant and Appropriate)

The hydrology regulations promulgated under the Strip and Underground Mine Reclamation Act, §§ 82-4-201 et seq., MCA, provide detailed guidelines for addressing the hydrologic impacts

of mine reclamation activities and earth-moving projects and are relevant and appropriate for addressing these impacts in the BPSOU.

ARM 17.24.631 (Relevant and Appropriate) provides that long-term adverse changes in the hydrologic balance from mining and reclamation activities, such as changes in water quality and quantity, and location of surface water drainage channels shall be minimized. Water pollution must be minimized and, where necessary, treatment methods utilized. Diversions of drainage to avoid contamination must be used in preference to the use of water treatment facilities. Other pollution minimization devices must be used if appropriate, including stabilizing disturbed areas through land shaping, diverting runoff, planting quickly germinating and growing stands of temporary vegetation, regulating channel velocity of water, lining drainage channels with rock or vegetation, mulching, and control of acid-forming, and toxic-forming waste materials.

ARM 17.24.633 (Relevant and Appropriate) provides water quality performance standards that may be invoked in the event that runoff from the treated areas threatens water quality or sediments in the stream, including the requirement that all surface drainage from a disturbed area must be treated by the best technology currently available (BTCA). Treatment must continue until the area is stabilized.

ARM 17.24.634 (Relevant and Appropriate) provides that, in reclamation of drainage, drainage design must emphasize channel and floodplain dimensions that approximate the pre-mining configuration and that will blend with the undisturbed drainage above and below the area to be reclaimed. The average stream gradient must be maintained with a concave longitudinal profile. This regulation provides specific requirements for designing the reclaimed drainage to:

1. approximate an appropriate geomorphic habit or characteristic pattern;
2. remain in dynamic equilibrium with the system without the use of artificial structural controls;
3. improve unstable premining conditions;
4. provide for floods and for the long-term stability of the landscape; and
5. establish a premining diversity of aquatic habitats and riparian vegetation.

ARM 17.24.635 through 26.4.637 (Relevant and Appropriate) set forth requirements for temporary and permanent diversions.

ARM 17.24.638 (Relevant and Appropriate) specifies sediment control measures to be implemented during operations.

ARM 17.24.639 (Relevant and Appropriate) sets forth requirements for temporary and permanent sedimentation ponds.

ARM 17.24.640 (Relevant and Appropriate) provides that discharge from sedimentation ponds, permanent and temporary impoundments, and diversions shall be controlled by energy dissipaters, riprap channels, and other devices, where necessary, to reduce erosion, prevent deepening or enlargement of stream channels, and to minimize disturbance of the hydrologic balance.

ARM 17.24.643 (Relevant and Appropriate) requires protection of groundwater resources.

ARM 17.24.645 (Relevant and Appropriate) sets forth requirements for groundwater monitoring.

ARM 17.24.646 (Relevant and Appropriate) sets forth requirements for surface water monitoring.

Reclamation and Revegetation Requirements (Relevant and Appropriate)

ARM 17.24.501 (Relevant and Appropriate) gives general backfilling and final grading requirements. Backfill must be placed so as to minimize sedimentation, erosion, and leaching of acid or toxic materials into waters, unless otherwise approved. Final grading must be to the approximate original contour of the land and final slopes must be graded to prevent slope failure, may not exceed the angle of repose, and must achieve a minimum long term static safety factor of 1:3. The

disturbed area must be blended with surrounding and undisturbed ground to provide a smooth transition in topography.

ARM 17.24.519 (Relevant and Appropriate) provides that an operator may be required to monitor settling of regraded areas.

ARM 17.24.702(4), (5), and (6) (Relevant and Appropriate) requires that during the redistributing and stockpiling of soil (for reclamation):

1. regraded areas must be deep-tilled, subsoiled, or otherwise treated to eliminate any possible slippage potential, to relieve compaction, and to promote root penetration and permeability of the underlying layer; this preparation must be done on the contour whenever possible and to a minimum depth of 12 inches;
2. redistribution must be done in a manner that achieves approximate uniform thicknesses consistent with soil resource availability and appropriate for the postmining vegetation., land uses, contours, and surface water drainage systems; and
3. redistributed soil must be reconditioned by subsoiling or other appropriate methods.

ARM 17.24.703 (Relevant and Appropriate) requires that when using materials other than, or along with, soil for final surfacing in reclamation, the operator must demonstrate that the material (1) is at least as capable as the soil of supporting the approved vegetation and subsequent land use, and (2) the medium must be the best available in the area to support vegetation. Such substitutes must be used in a manner consistent with the requirements for redistribution of soil in ARM 17.24.701 and 702.

ARM 17.24.711 (Relevant and Appropriate) requires that a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected shall be

established except on road surfaces and below the low-water line of permanent impoundments. See also § 82-4-233, MCA (Relevant and Appropriate). Vegetative cover is considered of the same seasonal variety if it consists of a mixture of species of equal or superior utility when compared with the natural vegetation during each season of the year (See also ARM 17.24.716 and 719 below regarding substitution of introduced species for native-species). This requirement may not be appropriate where other cover is more suitable for the particular land use or another cover is requested by the landowner.

ARM 17.24.713 (Relevant and Appropriate) provides that seeding and planting of disturbed areas must be conducted during the first appropriate period for favorable planting after final seedbed preparation.

ARM 17.24.714 (Relevant and Appropriate) requires use of a mulch or cover crop or both until an adequate permanent cover can be established. Use of mulching and temporary cover may be suspended under certain conditions.

ARM 17.24.716 (Relevant and Appropriate) establishes the required method of revegetation, and provides that introduced species may be substituted for native species as part of an approved plan.

ARM 17.24.717 (Relevant and Appropriate) relates to the planting of trees and other woody species if necessary, as provided in § 82-4-233, MCA, to establish a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the affected area and capable of self-regeneration and plant succession at least equal to the natural vegetation of the area, except that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved land use plan.

ARM 17.24.718 (Relevant and Appropriate) requires the use of soil amendments and other means such as irrigation, management, fencing, or other measures, if necessary to establish a diverse and permanent vegetative cover.

ARM 17.24.721 (Relevant and Appropriate) specifies that rills or gullies in reclaimed areas must be filled, graded or otherwise stabilized and the area reseeded or replanted if the rills and gullies are disrupting the reestablishment of the vegetative cover or causing or contributing to a violation of water quality standards for a receiving stream.

ARM 17.24.723 (Relevant and Appropriate) sets forth requirements for vegetation, soils, wildlife, and other monitoring.

ARM 17.24.724 (Relevant and Appropriate) specifies that revegetation success must be measured against approved unmined reference areas or by comparison with technical standards from historic data. More than one reference area or historic record must be established for vegetation types with significant variation due to a number of factors.

ARM 17.24.726 (Relevant and Appropriate) sets forth vegetation production, cover, diversity, density, and utility requirements.

ARM 17.24.728 (Relevant and Appropriate) sets forth performance standards for native species and introduced species in revegetated areas.

ARM 17.24.733 (Relevant and Appropriate) sets forth performance standards for composition and stocking of trees, shrubs, and half shrubs on the revegetated area and for measurement of revegetation success.

TO BE CONSIDERED DOCUMENTS (TBCS)

The use of documents identified as TBCs is addressed in the Introduction, above. A list of TBC documents is included in the Preamble to the NCP, 55 Fed. Reg. 8765 (March 8, 1990) . Those documents, plus any additional similar or related documents issued since that time, will be considered by EPA and DEQ during the conduct of the RI/FS, during remedy selection, and during remedy implementation.

OTHER LAWS (NON-EXCLUSIVE LIST)

CERCLA defines as ARARs only federal environmental and state environmental and siting laws. Remedial design, implementation, and operation and maintenance must nevertheless comply with all other applicable laws, both state and federal, if the remediation work is done by parties other than the federal government or its contractors.

The following "other laws" are included here to provide a reminder of other legally applicable requirements for actions being conducted at this operable unit. They do not purport to be an exhaustive list of such legal requirements, but are included because they set out related concerns that must be addressed and, in some cases, may require some advance planning. They are not included as ARARs because they are not "environmental or facility siting laws." As applicable laws other than ARARs, they are not subject to ARAR waiver provisions.

Section 121(e) of CERCLA exempts removal or remedial actions conducted entirely on-site from federal, state, or local permits.

This exemption is not limited to environmental or facility siting laws, but applies to other permit requirements as well.

Other Federal Laws

Occupational Safety and Health Regulations

The federal Occupational Safety and Health Act regulations found at 29 CFR § 1910 are applicable to worker protection during conduct of RI/FS or remedial activities.

Other Montana Laws

1. Groundwater Act

Section 85-2-505, MCA, (Applicable) precludes the wasting of groundwater. Any well producing waters that contaminate other waters must be plugged or capped, and wells must be constructed and maintained so as to prevent waste, contamination, or pollution of groundwater.

Section 85-2-516, MCA, states that within 60 days after any well is completed a well log report must be filed by the driller with the DNRC and the appropriate county clerk and recorder.

2. Public Water Supply Regulations

If remedial action at the site requires any reconstruction or modification of any public water supply line or sewer line, the construction standards specified in ARM 17.38.101 (Applicable) must be observed.

3. Water Rights

Section 85-2-101, MCA, declares that all waters within the state are the state's property, and may be appropriated for beneficial uses. The wise use of water resources is encouraged for the maximum benefit to the people and with minimum degradation of natural aquatic ecosystems.

Parts 3 and 4 of Title 85, Chapter 2, MCA, set out requirements for obtaining water rights and appropriating and utilizing water. All requirements of these parts are laws which must be complied with in any action using or affecting waters of the state. Some of the specific requirements are set forth below.

Section 85-2-301, MCA, of Montana law provides that a person may only appropriate water for a beneficial use.

Section 85-2-302, MCA, specifies that a person may not appropriate water or commence construction of diversion,

impoundment, withdrawal or distribution works therefore except by applying for and receiving a permit from the Montana Department of Natural Resources and Conservation. While the permit itself may not be required under federal law, appropriate notification and submission of an application should be performed and a permit should be applied for in order to establish a priority date in the prior appropriation system.

Section 85-2-306, MCA, specifies the conditions on which groundwater may be appropriated, and, at a minimum, requires notice of completion and appropriation within 60 days of well completion.

Section 85-2-311, MCA, specifies the criteria which must be met in order to appropriate water and includes requirements that:

1. there are unappropriated waters in the source of supply;
2. the proposed use of water is a beneficial use; and
3. the proposed use will not interfere unreasonably with other planned uses or developments.

Section 85-2-402, MCA, specifies that an appropriator may not change an appropriated right except as provided in this section with the approval of the DNRC.

Section 85-2-412, MCA, provides that, where a person has diverted all of the water of a stream by virtue of prior appropriation and there is a surplus of water, over and above what is actually and necessarily used, such surplus must be returned to the stream.

4. Controlled Ground Water Areas

Pursuant to § 85-2-507, MCA, the Montana Department of Natural Resources and Conservation may grant either a permanent or a temporary controlled ground water area. The maximum allowable time for a temporary area is two years, with a possible two-year extension.

Pursuant to § 85-2-506, MCA, designation of a controlled ground water area may be proposed if: (i) excessive ground water withdrawals would cause contaminant migration; (ii) ground water withdrawals adversely affecting ground water quality within the ground water area are occurring or are likely to occur; or (iii) ground water quality within the ground water area is not suited for a specific beneficial use.

5. Occupational Health Act, §§ 50-70-101 et seq., MCA.

ARM § 17.74.101 addresses occupational noise. In accordance with this section, no worker shall be exposed to noise levels in excess of the levels specified in this regulation. This

regulation is applicable only to limited categories of workers and for most workers the similar federal standard in 29 CFR 1910.95 applies.

ARM § 17.74.102 addresses occupational air contaminants. The purpose of this rule is to establish maximum threshold limit values for air contaminants under which it is believed that nearly all workers may be repeatedly exposed day after day without adverse health effects. In accordance with this rule, no worker shall be exposed to air contaminant levels in excess of the threshold limit values listed in the regulation. This regulation is applicable only to limited categories of workers and for most workers the similar federal standard in 29 CFR § 1910.1000 applies.

6. Montana Safety Act

Sections 50-71-201, 202 and 203, MCA, state that every employer must provide and maintain a safe place of employment, provide and require use of safety devices and safeguards, and ensure that operations and processes are reasonably adequate to render the place of employment safe. The employer must also do every other thing reasonably necessary to protect the life and safety of its employees. Employees are prohibited from refusing to use or interfering with the use of safety devices.

7. Employee and Community Hazardous Chemical Information

Sections 50-78-201, 202, and 204, MCA, state that each employer must post notice of employee rights, maintain at the work place a list of chemical names of each chemical in the work place, and indicate the work area where the chemical is stored or used. Employees must be informed of the chemicals at the work place and trained in the proper handling of the chemicals.

